

1. Did claimant sustain an accidental injury arising out of and in the course of her employment with respondent?
2. If so, did the Judge exceed his jurisdiction by ordering an examination by a neutral physician and requesting recommendations for treatment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes:

Claimant worked as a medical transcriptionist for respondent for approximately three and one-half years. During the period from May 10, 2002, through October 21, 2003, which was the last day claimant performed work for respondent, claimant developed upper extremity, neck and shoulder pain that she attributed to her typing duties. Claimant testified the pain would get worse the more she typed. After being off work and on leave for several months, claimant's employment with respondent ended on March 25, 2004.

Since developing upper extremity, neck and shoulder pain, claimant has seen many doctors. Claimant began seeing Dr. Mark Box in July 2003, with whom she continues to treat. Claimant testified Dr. Box told her typing was aggravating her situation and she should not be typing.

Claimant saw Dr. Gordon R. Kelley of Neurology Consultants, Chartered, for an EMG of her right upper extremity in October 2003. The results of the EMG were normal. Nerve conduction and EMG studies performed in December 2003 also showed normal findings. Claimant underwent x-rays, a cervical spine myelogram and a cervical spine CT scan in January 2004. The CT scan indicated, among other things, claimant had mild posterior disc bulging and marginal spurring at C5-6, left greater than right, resulting in borderline central spinal stenosis and mild left foraminal narrowing.

Neurosurgeon Dr. Frank P. Holladay saw claimant in January and February 2004. In a February 9, 2004 report, Dr. Holladay wrote that claimant's arm pain may be an overuse type problem, although rest had given claimant no significant benefit. Dr. Holladay believed claimant's best course of treatment would be a referral to a physiatrist.

An undated report from Metro Rehabilitation Services¹ indicated claimant had decreased strength in both upper extremities, with the right being more affected than the left.

Claimant saw Dr. Kelley again in June 2004. Dr. Kelley stated in a June 21, 2004 report that claimant's right arm pain appeared to be related to overuse although no objective abnormalities had been identified.

But Dr. Chris D. Fevurly, who is board-certified in both internal medicine and preventive medicine, saw claimant in March 2004 and opined that claimant's right upper extremity pain complaints were not causally related to any injury from her work but were inherently related to a probable preexisting chronic somatoform disorder. Dr. Fevurly also

¹ It appears the evaluation resulting in this report occurred in May 2004. See P.H. Trans. at 48.

opined the cervical spine findings (the degenerative disc changes and the bony spondylosis) had no clinical correlation or causal relationship to claimant's right upper extremity symptoms and were not causally related to her work.

Currently, claimant's problems include headaches, neck pain and arm pain and numbness. As indicated above, Dr. Box told claimant that typing was aggravating her condition and that she should not be typing. Claimant also testified she was advised while undergoing physical therapy that typing was not a good fit for her and that it was aggravating her condition. According to claimant, the treatment she has received has not really helped. Therefore, claimant requested additional medical treatment at the preliminary hearing.

After conducting the preliminary hearing and reviewing medical reports attached to the preliminary hearing transcript, Judge Foerschler ordered an examination and recommendations. In doing so, the Judge impliedly found claimant sustained an accidental injury arising out of and in the course of her employment with respondent as the Judge stated a minor component of claimant's symptoms was related to her work. Moreover, the Judge did not indicate that the purpose of the ordered medical examination was to obtain additional information to address the issue of causation, which further implies that the Judge determined that claimant sustained an accident arising out of and in the course of her employment with respondent. By the barest of margins, the Board affirms that finding and will not disturb Judge Foerschler's order. The Judge did not exceed his jurisdiction by ordering the examination as the Workers Compensation Act specifically empowers the administrative law judges to employ neutral health care providers when there are disputes regarding a worker's injuries.²

WHEREFORE, the Board affirms the July 20, 2004 Preliminary Decision entered by Judge Foerschler.

IT IS SO ORDERED.

Dated this ____ day of September 2004.

BOARD MEMBER

c: Robert W. Harris, Attorney for Claimant
D'Ambra M. Howard, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² See K.S.A. 44-516.